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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

No. 262-263-264

STROBEL STEEL CONSTRUCTION COMPANY,
a corporation,
Petitioner and Appellant below,

v.

STATE HIGHWAY COMMISSIONER OF THE STATE
OF NEW JERSEY,
Respondent and Appellee below.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI**

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(Except as otherwise noted all italics are ours.)

Jurisdiction

We submit the writ ought not to be allowed because the questions presented by the record are no longer subjects of discussion in this court. *Ex parte Spies*, 123 U. S. 131, 31 L. ed. 80.

This court has continuously held that an action against a state officer or body is an action against the state when the state, though not named, is the real party against whom the relief is sought, and the judgment will operate, and that no rights under the Fourteenth Amendment are violated by the dismissal by a state court of an action brought against

the state. The decision sought to be reviewed is in accord with the decisions of this court.

Although petitioner asks a review of a judgment of the New Jersey Court of Errors and Appeals on April 30, 1942, it is really attempting to review an earlier decision of that court made on April 29, 1938. At that time the state court held that the contract which forms the subject of the present action was a contract of the State of New Jersey, and that the respondent was its *alter ego*, not suable without consent. The decision presently sought to be reviewed is a holding by the state court that the petitioner can not enforce this same contract indirectly by means of the prerogative writs of *mandamus* and *certiorari*.

Statement of the Case

On July 10, 1929, petitioner entered into a contract with respondent's predecessor, the State Highway Commission of the State of New Jersey, wherein petitioner agreed to construct a bridge over the Hackensack River for the Commission (R. 108-111). Petitioner defaulted on November 6, 1930 (R. 62, 63, 152) and its surety completed the work (R. 153).

On November 4, 1936, petitioner instituted an action at law in the New Jersey Supreme Court seeking recovery of money damages claimed to be due under the contract. The trial court struck the complaint. Petitioner appealed and, on April 29, 1938, the action of the Supreme Court was affirmed by the New Jersey Court of Errors and Appeals, the court holding that the suit was, in effect, a suit against the state itself and could not be maintained because legislative consent had not been given. The court further held that it was not the intent of the legislature to set up the Highway Commission as an independent body which might be sued. *Strobel Steel Construction Company v. State Highway Commission*, 120 N. J. L. 298 (R. 210-211). Peti-

tioner made no effort to have this court review that decision. As petitioner has not inserted a copy of this opinion in the record, we have set it forth in full in the appendix to this brief (p. 17).

On November 18, 1936, petitioner obtained from Justice Case of the New Jersey Supreme Court an order why "*a rule to show cause should not be made for the issuance of a peremptory or alternative writ of mandamus*" directing the Highway Commissioner and State Treasurer to pay the identical claims for which recovery was sought in the action at law (R. 1, 27-28, 211-212) and urged the same contract as the basis of its application. When this matter was moved for argument on January 4, 1939, Justice Case denied a writ, peremptory or alternative, but granted petitioner permission to mould the proceedings on an alternative writ so that the questions decided by him might be presented by appeal to the New Jersey Court of Errors and Appeals (R. 82, 83, 84, 225-228). Three proposed writs were presented by petitioner to Justice Case (R. 85-165). Their mandates varied (R. 90, 98, 164-165). The one finally signed contained a direction to the Commissioner "*to pass upon the claims of the Relator, Strobel Steel Construction Co.*" (R. 165), as distinguished from the payment of its claims, the action sought under the rule to show cause (R. 27-28, 225-228). The Supreme Court sustained respondent's demurrer to this writ and this action was affirmed by the Court of Errors and Appeals. *Strobel Steel Construction Company v. Sterner*, 128 N. J. L. 379 (R. 259, *et seq.*). This affirmance constitutes part of the action of the state court sought to be reviewed here. Part of the decision sought to be reviewed held that no appeal would lie from the refusal of the Supreme Court to vacate the rule for judgment entered on the moulded writ, since the action of the Supreme Court was discretionary (R. 191, 259-267).

At the time the contract between the parties was made the New Jersey State Highway Department was headed by a four man commission (P. L. 1917, c. 15, as amended by

P. L. 1923, c. 6). In 1935 this commission was abolished and a single commissioner substituted (P. L. 1935, c. 178). E. Donald Sterner was appointed Commissioner. He has since been succeeded by Spencer Miller, Jr.

On July 25, 1933, the four man commission determined at an open meeting in the presence of representatives of petitioner's bonding company that there was due to petitioner a balance of \$8,520.48 (R. 149-151). A copy of the estimate certificate appears in the record at page 230.

Because petitioner argued in the mandamus proceedings that its claims had not been passed upon, Highway Commissioner Sterner, the department head appointed under the 1935 Act, invited petitioner to present its claims to him. This offer petitioner did not accept (R. 221-222; 232-236). The Commissioner then proceeded to investigate petitioner's claims and made a determination that the sum due was \$8,520.48 (R. 151-157). In January, 1940 petitioner applied to the New Jersey Supreme Court for a writ of certiorari to review this determination. It abandoned this application. In January, 1941 it again applied to the same court for a writ of certiorari. This application was denied (R. 237-239) and, on appeal, the Court of Errors and Appeals held that the refusal of the writ was not appealable, 128 N. J. L. 279 (R. 259, *et seq.*). This action of the state court is also sought to be reviewed.

Summary of Argument

We urge that the writ should not be granted because:

1. Petitioner is here attempting to have this court review questions which it should have presented to the court in 1938.

2. The state court decided the cases presently attempted to be reviewed on grounds that did not require the determination of a question involving constitutional rights; and

3. Because the decision of the state court sought to be reviewed did not deprive petitioner of any constitutional rights.

Under this third point we urge that the contract which forms the basis of this action is a contract of the State of New Jersey which cannot be enforced without the state's consent, the Highway Department being a branch of the executive department of the state government and its head, an administrative officer of the state. We urge that petitioner is not seeking relief against the officer as an individual, but is attempting to enforce a contract of the state, controlling the action of the state and subjecting it to liability, contrary to the firmly established principles of American jurisprudence.

ARGUMENT

POINT I

The questions attempted to be presented here are not now properly before this court.

The Court of Errors and Appeals of New Jersey decided on April 29, 1938, that the State Highway Commission is an *alter ego* of the State and that the suit brought against it at law by the present petitioner was a suit against the State and would not lie. That court, in that suit, construed the statutory provisions set forth on pages 12 and 13 of petitioner's brief and attempted to be presented as Question 1. It held the New Jersey legislature did not intend to give consent that the Commission might be sued. It further held that, since petitioner did not see fit to argue the constitutional points raised in that case (and now attempted to be raised in this court as Question 2), it would only say there was no merit in them. 120 N. J. L. 298 (Appendix to this brief). A review of that decision would have brought

before this court both questions now attempted to be presented, but petitioner did not see fit to seek that course.

As was said by the court below, citing *Reeside v. Walker*, 52 U. S. 272, 13 L. ed. 693, 700, the actions which have presently resulted in this appeal were attempts by means of *certiorari* and *mandamus* to accomplish by indirection the enforcement of a contract which it had been already held petitioner could not accomplish directly.

It is submitted that petitioner should have sought *certiorari* within three months after the original decision. 28 U. S. C. § 350.

POINT II

The state court decided the case on independent grounds not within the federal objections taken, which independent grounds were sufficient to sustain the judgment.

The opinion below, 128 N. J. L. 379 (R. 259, *et seq.*), distinctly shows that the court decided that the refusal of the Supreme Court to allow petitioner's application for *certiorari* was a discretionary act and not reviewable. It also shows that all other grounds urged, except the question of passing upon claims, were discretionary acts and not appealable.

As to whether the Commissioner could be required to pass upon petitioner's claims, it will be seen that the court held that, although there was no requirement to do so, he did pass upon the claims and rejected them (R. 260).

It will be plainly seen that the state court decided the case on grounds that did not require the determination that these actions could not be brought against the State and, therefore, this court will not review the case. 27 R. C. L., title "*States*" § 83, page 78, and numerous cases cited.

POINT III

The petitioner has not been deprived by the determination of the state court sought to be reviewed of any right guaranteed to it under the Fourteenth Amendment to the Constitution of the United States.

The right of individuals to sue a state, in either a Federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the state. *Beers v. Arkansas*, 61 U. S. 527, 15 L. ed. 991; *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 S. Ct. 504.

No rights guaranteed under the Fourteenth Amendment are violated by the dismissal by a state court of an action brought against the state. *Palmer v. Ohio*, 248 U. S. 32, 63 L. ed. 108, 39 S. Ct. 16.

The State of New Jersey cannot be sued without its consent. *Smith v. Reeves*, 178 U. S. 436, 448, 44 L. ed. 1140, 20 S. Ct. 919; *Duhne v. New Jersey*, 251 U. S. 311, 64 L. ed. 280, 40 S. Ct. 154.

The State Highway Commissioner is an administrative officer of the government and the State Highway Department is a branch of the executive department of the government of New Jersey.

The State Highway Department was established in 1917 (P. L. 1917, Chap. 15, p. 35). Under that Act it consisted of the Governor and eight members appointed by him with the advice and consent of the Senate. It was subsequently provided (P. L. 1923, Chap. 6, p. 19), that the State Highway Department should be governed by a Board of four members. Since that time the four man board has been legislated out of existence and the office of State Highway Commissioner created (P. L. 1935, Chap. 178, p. 440).

The Department operates under a budget as provided in P. L. 1933, Chap. 193, page 418 (R. S. 52:22-20), partially

set forth in the appendix. Its funds are the funds of the State and have been diverted by the legislature for emergency relief (P. L. 1936, c. 26, set forth in the appendix, and other similar acts).

The New Jersey Statutes provide:

"27:1-1. The administrative organization heretofore established and designated as the state highway department, hereafter in this title referred to as the department, shall be continued subject to the provisions of this chapter, as a branch of the executive department of the state government, and the state highway commissioner heretofore appointed pursuant to the provisions of an act entitled 'An act to establish the office of state highway commissioner and to define the powers and duties thereof and to vest all the powers and duties now devolved by law upon the state highway department and the state highway commissioner', approved April twenty-ninth, one thousand nine hundred and thirty-five, is hereby continued in office for the remainder of the term of office for which he was appointed."

And 27:1-2:

"The department shall be deemed to consist of the state highway commissioner, and all officers and employees continued in offices or employments or appointed under the provisions of this chapter, but all the powers of the department shall reside in the state highway commissioner as the administrative head thereof."

And 27:1-5:

"The commissioner shall succeed to and exercise all the powers and perform all the duties exercised or performed by the state highway department and the state highway commission, or either of them, as constituted prior to April twenty-ninth, one thousand nine hundred and thirty-five, by virtue of any then existing law or laws."

And 27:1-7:

"In general, the commissioner shall be the administrative and executive head of the department. He shall devote full time to the duties of his office."

It was at one time held that the Eleventh Amendment to the Constitution of the United States, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign State", was applicable only to cases in which the State was named in the record as a party defendant. *Osborne v. United States Bank*, 22 U. S. 738, 6 L. ed. 204. But later rulings have modified that decision, and held that the amendment applies to any suit brought in name against an officer of the State, when "*the State, though not named, is the real party against which the relief is asked, and the judgment will operate.*" *In re Ayres*, 123 U. S. 443, 31 L. ed. 216, 8 S. Ct. 164; *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 S. Ct. 699; *Minnesota v. Hitchcock*, 185 U. S. 373, 386, 46 L. ed. 954, 22 S. Ct. 650.

Although the action is brought against a state officer, the ultimate result sought by the petitioner is the enforcement of a contract of the state and is therefore a suit against the state. *McCaulley v. Kellog*, 2 Woods 13, 23. This is particularly emphasized by the fact that petitioner brought its action at law against the *Highway Commission*, then amended it so as to direct the action there, as now here, against the *Commissioner*. He is not sued as an individual but as a state officer. (See opinion in appendix.)

The relief sought by petitioner, although nominally against the State Highway Commissioner is actually sought against the state and would operate to control the action of the state and subject it to liability, and therefore will not lie. 25 R. C. L., title "*States*", § 50, page 413, and cases cited.

It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as a defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on that court by the Constitution. *Cunningham v. Macon and Brunswick R. R. Co., et al.*, 109 U. S. 446, 451, 27 L. ed. 992, 3 S. Ct. 292.

We cite a few of the many cases in which it has been held that a suit against a state officer is a suit against a state:

Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 S. Ct. 128 (State Auditor, Treasurer and Board of Liquidation);

Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805, 6 S. Ct. 608 (State Treasurer, Comptroller General and others);

Ex parte Ayres, *supra* (State Auditor and Attorney General);

Smith v. Reeves, *supra* (State Treasurer);

Pennoyer v. McConnaughy, *supra* (Land Commissioners).

Petitioner cannot do indirectly by *mandamus* and *certiorari* that which the highest state court held in April, 1938 it could not do directly by an action at law. *Reeside v. Walker*, 52 U. S. 272, 13 L. ed. 693, 700.

Where the New Jersey Legislature has intended that state agencies should be subject to suit, it has expressly said so. We cite a few examples of the expression of the Legislative intent.

The Act creating the *Commissioners of Palisades Park* provides (R. S. 32:14-2):

"Corporate powers of board, actions; seal; by-laws. The board of commissioners and its successors shall be

a body politic, with power to sue and be sued, use a common seal and adopt by-laws to regulate its proceedings."

And the act creating the *Delaware River Joint Commission* (R. S. 32:3-5) :

"For the effectuation of its authorized purposes the commission is hereby granted the following powers:

b. To sue and be sued."

The *Delaware River Joint Toll Bridge Commission* (R. S. 32:8-3), enumerating powers:

"* * * b. To sue and be sued."

And the *South Jersey Port District* (R. S. 12:12-2) :

"The District is hereby declared to be a public corporation and body politic and shall have power to:

b. Sue and be sued."

Also the *Port Raritan District* (R. S. 12:12-2), enumerating powers:

"b. Sue and be sued."

And *High Point Park* (R. S. 13:5-2) :

"The board of commissioners and its successors shall be a body politic, with power to sue and be sued * * *."

The New Jersey courts have uniformly held that actions against state officials and bodies are actions against the state which will not lie unless express legislative consent is given. *Curtis and Hill Gravel and Sand Co. v. State Highway Commission*, 91 N. J. Eq. 421; *Haycock v. Jannarone* (Court of Errors and Appeals), 99 N. J. L. 183; *Nesbitt v. Board of Managers, New Jersey Agriculture Experiment Station*, 10 N. J. Mis. R. 19; *Stephens v. The Commissioners of the Palisades Interstate Park* (Court of Errors and Appeals, 1919), 93 N. J. L. 500; *DeSantis v. Delaware*,

Lackawanna and Western Railroad, et al., 11 N. J. Mis. R. 22; *Board of Tenement House Supervision v. Schlecter*, 83 N. J. L. 88; *State Highway Commission v. Elizabeth*, 102 N. J. Eq. 221; *affirmed* (Court of Errors and Appeals), 103 Id. 375; see also the interesting comment in the *per curiam* opinion in *Union Indemnity Co. v. State Highway Commission*, 105 N. J. L. 656 (at p. 657); *Strobel Steel Construction Company v. State Highway Commission*, 120 N. J. L. 298.

While it is true that suits have been permitted against private corporations formed under federal authority where the words "*to sue and be sued*" do not appear, yet in each such instance it has been clear that it was intended that such private corporations might be sued. There is a vast distinction between the actions against legislatively authorized bodies incorporated under general corporation laws permitted in *Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, *Federal Housing Administration v. Burr*, 309 U. S. 242, and *Reconstruction Finance Corp. v. Menihan*, 312 U. S. 81, cited by petitioner and the present effort to enforce a contract against a sovereign state.

The funds expended for the work of the Highway Department are the funds of the state. They are expended through the usual state channels. The Department's work is the construction and maintenance of a state highway system reaching throughout the state and benefitting all its citizens.

It is stated in 25 R. C. L. title "*States*", § 49, p. 412:

"49. General Rule as to State's Immunity from Suit. —*It is well settled that a state cannot be sued in its own courts, or in any other, unless it has expressly consented to such suit, except in the limited class of cases in which a state may be made a party in the supreme court of the United States, by virtue of the original jurisdiction conferred on such court by the constitution. The doctrine rests upon reasons of public policy—the inconvenience and danger which would fol-*

low from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government."

In the footnotes below the citation there appear many cases decided by this court.

The reason for the rule is particularly apparent in this case, the present petitioner, having defaulted on its contract, waited until two days before the statute of limitations would have run before bringing its action at law. It then made application for *mandamus* which was carried on over a period of five years (R. 1, 191). *Certiorari* was applied for in 1941 (R. 194). A previous application for a writ of *certiorari* was noticed and abandoned. Testimony was taken in the Court of Chancery (R. 195) and in many other ways the state's operations have been hindered.

It is evident from a full reading of the quotation from the specifications appearing on pages 13 and 14 of the petitioner's brief (the italics there being the petitioner's solely) that it was intended as a reservation by the Commission of the right and responsibility to itself of deciding whether a claim for extras should be allowed.

Whether the power given to the Highway Commission to enter contracts as an independent contractor is to be construed as a consent to a suit against the state is not involved in this case. The contract here was for the *construction* of a bridge (R. 109). The statutory provisions relied on by petitioner to sustain its action all deal with *repairs and maintenance*, not *construction*.

P. L. 1927, chapter 319, par. 106 reads as follows:

"The State Highway Commission shall take charge of all work on State highways and maintain the same

in good order. All work of improvement, betterment, reconstruction, or resurfacing shall be done in accordance with plans and specifications prepared by the State Highway Department. All work of *maintenance, repair and extraordinary repair* shall be done at the expense of the State and may be done either as an independent contractor or employer or through contracts made in the name of the State of New Jersey."

P. L. 1927, chapter 319, par. 111 provides:

"111. In addition to, and not in limitation of, its general powers, the State Highway Commission shall have power—

a. To determine and adopt rules, regulations and specifications and to enter into contracts covering all matters and things incident to the acquisition, improvement, betterment, construction, reconstruction, maintenance and repair of State Highways.

b. To execute and perform as an independent contractor or through contracts made in the name of the State of New Jersey, all manner of work incident to the *maintenance and repair* of State highways.

c. To establish and maintain as an independent contractor or employer a patrol repair system for the proper and efficient maintenance and repair of State highways * * *."

And the statute defines "*maintenance*" and "*repair*", par. 118, at page 731:

"*Maintenance*: Continuous work required to hold an improved road against deterioration due to wear and tear and thus to preserve the general character of the original improvement without alteration in any of its component factors."

"*Repairs*: Limited or minor replacements in one or more of the component factors of the original improvement of a road which may be required by reason of storm or other happening in order that there may be restored a condition requiring only maintenance to preserve the general character of the original improvement of a road."

The same Act defines "*extraordinary repair*" as:

"Extensive or entire replacement, with the same or a different kind of material, of one or more of the component factors of the original improvement of a *road*, which may become necessary because of wear, disintegration or other failure."

The State Court held that the statutory provisions relied on by petitioner did not constitute an intent that the highway department be subject to suit. 120 N. J. L. 298 (Appendix).

The construction of a statute by a state court is binding on this court. *Missouri, ex rel. Hurwitz v. North*, 271 U. S. 40, 70 L. ed. 818, 46 S. Ct. 384.

There is no provision in the New Jersey statutes permitting the Highway Department to enter a *construction* contract as an independent contractor. Furthermore it is a fundamental rule of construction that what is not clearly granted by the state is withheld, and that statutes permitting suits against the state, being in derogation of sovereignty, must be strictly construed. 25 R. C. L. title "*States*", § 52, page 416.

Petitioner knew when it entered the contract that, in the event of a breach thereof, its only remedy was an appeal to the state legislature. *Bank of Washington v. Arkansas*, 61 U. S. 530, L. ed. 993.

We submit that there is no trend toward any implication that state legislatures have intended that state officers performing state duties may be sued unless the legislature expressly provides otherwise. The law is settled to the contrary throughout the country. States can function through officers and agents only. It has not been the legislative practice in any state, when creating a state office or agency, to insert a provision that such state officer or state agency should not be subject to suit. We have not found a de-

cision anywhere in the country which has permitted suit against state officers or agencies representing the state in the absence of expressed consent. If the law were otherwise the Eleventh Amendment would be completely nullified as far as the sovereignty of every state in the union is concerned. In the event of a present holding to the contrary the programs and financial structures of every state in the union will be thrown into complete chaos.

CONCLUSION

For the reasons above urged, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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